APPEAL NO. 010637

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 12, 2001. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable occupational disease injury and that the respondent (carrier) did not waive its right to contest compensability under Section 409.021(c). In his appeal, the claimant asserts error in each of those determinations. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed, as reformed.

Initially, we note that in Finding of Fact No. 4 the hearing officer stated that the "claimant first received notice of the claimed injury on _____." This is an obvious typographical error, in that the hearing officer intended to make a finding as to the date the carrier received written notice of the injury as part of the resolution of the carrier waiver issue. As such, we reform Finding of Fact No. 4 by substituting the word "carrier" for the word "claimant" in the finding.

The hearing officer did not err in determining that the claimant did not sustain a compensable injury. That question presented a question of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer resolves the conflicts and inconsistencies in the evidence, and determines what facts have been established from the evidence. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); St. Paul Fire & Marine Ins. Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer was acting within her province as the fact finder in determining that the claimant did not sustain her burden of proving that she sustained a compensable occupational disease injury to her neck, shoulders, back, and lungs. Nothing in our review of the record demonstrates that the hearing officer's determination in that regard is so contrary to the great weight of the evidence as to compel its reversal on appeal.

The hearing officer also determined that the carrier did not waive its right to contest compensability, stating that the "failure to persuasively establish the existence of the claimed injuries makes the issue of carrier waiver moot under prevailing case law." Although the hearing officer does not cite the case, it is apparent that he has determined that there is no waiver in this instance under Continental Cas. Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). We cannot agree that this is a

circumstance where Williamson applies in that we have held that Williamson does not apply to situations where there is evidence of an injury, damage or harm to the physical structure of the claimant's body, and the issue is whether the injury is related to the employment. Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998, and Texas Workers' Compensation Commission Appeal No. 992864, decided February 4, 2000. The evidence in this case establishes that the claimant has some injury to her neck, shoulders, back, and lungs. Thus, this is a situation where a waiver could exist if the carrier failed to contest compensability within the 60-day period provided for doing so. Nevertheless, the hearing officer also determined that the carrier contested compensability within 60 days of the date it received written notice of the injury. That determination is affirmable. The claimant asserts that the carrier received written notice on April 20, 2000, when the claimant's attorney faxed a copy of the claim to the carrier's third-party administrator. However, we have rejected the argument that notice to the third-party administrator triggers the 60-day period. Rather, that period begins to run when the carrier receives written notice of the injury. Texas Workers' Compensation Commission Appeal No. 000506, decided April 12, 2000; Texas Workers' Compensation Commission Appeal No. 970288, decided April 3, 1997. The hearing officer determined that the carrier received its first written notice of the injury on _____, and that determination is supported by the evidence. Accordingly, the hearing officer did not err in determining that the carrier timely contested compensability by filing its July 24, 2000, Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21).

As reformed, the hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge